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No. 460

In the Supreme Court of the United States

OCTOBER TERM, 1955

EARL P. GREENWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

CHARLES H. HARRIS,
Attorney in the Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinions of the court of appeals (R. 75–90) are reported at 219 F. 2d 376. The order and opinion of the district court (R. 17–21) are reported at 125 F. Supp. 777 (W. D. Mo.).

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1955 (R. 91). The petition for a writ of certiorari was filed on March 11, 1955, and was granted on October 10, 1955 (R. 91–92). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provisions of 18 U. S. C. 4244, 4246, 4247, and 4248 authorize the commitment of a person, charged with commission of a federal crime, who, is found to be mentally incompetent with little likelihood of recovery.

2. Whether the provisions of 18 U. S. C. 4244, 4246, 4247, and 4248, which authorize the commitment, under specified conditions, of an incompetent charged with federal crime, without regard to the liklihood of his recovery, are constitutional.

3. Whether the district court's finding that petitioner, if released, would probably endanger the safety of officers, property, or other interests of the United States is sustained by substantial evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent provisions of the United States Constitution and the Act of September 7, 1949, 63 Stat. 686, 18 U. S. C. 4244–4248, are set forth as an Appendix, *infra*, pp. 59–63.

STATEMENT

Petitioner is at present in the custody of the Attorney General at the United States Medical Center for Federal Prisoners at Springfield, Missouri, following a commitment order entered by the district court on July 30, 1954 (R. 17, 18) which was affirmed by the court of appeals on February 14, 1955 (R. 91). The events leading

up to and including petitioner's commitment are as follows:

On November 20, 1952, the federal grand jury for the Western District of Missouri returned an indictment charging petitioner in two counts with violations of 18 U. S. C. 2114 on October 22, 1952, by armed robbery of a post office and felonious assault upon a postal clerk (R. 1–2). Following his arrest in Cleveland, Ohio (see R. 76), and pursuant to Rule 20 of the Federal Rules of Criminal Procedure, petitioner consented to transfer of the case to the Northern District of Ohio (R. 2). On February 2, 1953, a hearing was held in the district court for that district (R. 3). A psychiatrist who had examined petitioner testified that petitioner was suffering from schizophrenia, would not be fully capable of cooperating with his attorney in his defense, and probably did not understand the full import of his consent to a Rule 20 proceeding (R. 4–7). Thereupon the court remanded the case for disposition to the Western District of Missouri (R. 8, 9).

The District Court for the Western District of Missouri, on February 17, 1953, ordered petitioner to be delivered to the United States Medical Center for Federal Prisoners at Springfield, Missouri, for an examination and report as to his mental condition (R. 9–10). On April 8, 1953, a report of a psychiatric examination of petitioner was

prepared by the staff of the Medical Center (R. 59–64). This first report recited that in 1945 petitioner had been arrested for robbery and shortly thereafter for assault; that in 1946 he received a one to twenty year sentence on a forgery charge; that he freely admitted holding up a post office in Kansas City; that he also had held up a post office in Cleveland.[1] The report concluded that petitioner was suffering from acute schizophrenia and was legally insane. (R. 59–64.) On November 16, 1953, the court ordered petitioner returned to the Medical Center for such treatment as might be necessary to determine whether he was acutely or chronically insane (R. 11).

A second report issued by the staff of the Medical Center, dated January 26, 1954 (R. 64), again diagnosed petitioner's illness as schizophrenia. The staff agreed unanimously that petitioner remained incompetent. It found his condition to be chronic with poor prognosis of recovery. The recommendation was that consideration be given petitioner's transfer to a state hospital in his state of residence inasmuch as it was unlikely that he would regain his sanity in the near future. (R. 64–66.)

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[1] As the report indicates (R. 61), the Cleveland robbery occurred subsequent to the Kansas City robbery for which petitioner was indicted. Department of Justice records indicate that, in view of the mandatory sentence of 25 years for armed robbery under the Missouri charge, institution of criminal action based on the Cleveland offense was deferred pending disposition of the Missouri charge.

On February 2, 1954, the district court in the light of this report ordered a hearing under 18 U. S. C. 4246, pointing out (R. 12):

> It now having been determined that defendant is so mentally defective that he will probably never be able to stand trial on the charge pending against him in this Court, a further hearing must be held which will resolve the power to commit defendant as mentally defective under the conditions specified in Section 4247, Title 18, United States Code, i. e., whether if defendant is "released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the (defendant) are not otherwise available."

The court requested certification of a finding with respect to the quoted statutory propositions within five days and, if the answer were in the affirmative, that petitioner be asked to select a psychiatrist pursuant to 18 U. S. C. 4247, to examine him for a hearing to be held pursuant to 18 U. S. C. 4246. The court further requested certification of termination of commitment if in the interim the Attorney General should transfer the petitioner to the custody of state authorities. (R. 13.)

The Board of Examiners at the Medical Center submitted the requested report, dated February 4, 1954. The board concurred unanimously in the opinion that the petitioner remained psychotic

and incompetent, that his illness was chronic and that there appeared little likelihood that he would recover in the near future to the extent that he might be considered competent. (R. 66–69.) The board specifically considered petitioner's potential dangerousness as specified in 18 U. S. C. 4247. Though it found no fixed delusions indicating a desire to harm anyone, it stated (R. 68):

> The Board agreed that this subject might be considered potentially dangerous to the extent that if released he might conceivably persist in criminal activities of the type with which he is presently charged.

The board recommended that petitioner be placed in the care of a state hospital (R. 68).

Petitioner remained at the Medical Center until May 1954, at which time, pursuant to the court order of February 17, 1953, *supra*, pp. 3–4, as modified on February 2, 1954, *supra*, p. 5, the Attorney General delivered him to the custody of authorities of the State of Ohio (see R. 19). The record is not clear on the exact nature of subsequent proceedings in Ohio but it appears that petitioner was examined by the same psychiatrist who testified at the hearing which led to his removal to the Western District of Missouri (*supra*, p. 3) and that he found petitioner sufficiently improved to consider him no longer insane in the legal sense (R. 51, 71–72). In any event, petitioner was released by Ohio authorities, rear-

rested on the charges pending against him and returned to the Western District of Missouri (R. 15, 16).

On June 18, 1954, counsel for petitioner, appointed by the court, filed a motion for the appointment of psychiatrists to examine petitioner with respect to his competency, and for a hearing, pursuant to 18 U. S. C. 4244 (R. 13). On June 23, 1954, the district court appointed two psychiatrists (R. 14–15) and on July 2, 1954, it ordered petitioner returned to Springfield for determination of his sanity and, if insane, for findings whether his condition was temporary or permanent and whether petitioner, if released, would probably endanger the safety of officers, property or other interests of the United States (R. 16–17). The report of the neuropsychiatric staff, dated July 8, 1954, prepared in response to the court's order, stated that petitioner remained legally insane, that the prognosis for his recovery was poor, and that he would probably require indefinite hospitalization. The staff concluded that petitioner was not potentially dangerous "except to the extent that if released he might persist in engaging in criminal activities similar to those with which he is presently charged." (R. 69–71.)

On July 15, 1954, the district court conducted a hearing as to petitioner's mental competency pursuant to 18 U. S. C. 4244 (R. 23). It heard

the testimony of the two court appointed psychiatrists who examined petitioner for a little in excess of one hour and found him to be legally sane (R. 25, 32). The court also heard the testimony of Dr. Charles E. Smith, chief of the psychiatric service at the Medical Center who participated in several examinations of petitioner. Dr. Smith testified that in his opinion petitioner was still insane, that his chances of recovery were poor and that, if released, petitioner might continue to engage in criminal activities. (R. 47–48.) In addition to the testimony, the court received in evidence the four reports previously mentioned (R. 58).

On July 30, 1954, the court entered its order. It found (1) that petitioner was insane and mentally incompetent to stand trial; (2) that, if released, petitioner would probably endanger the safety of officers, property or other interests of the United States; (3) that no suitable arrangement for the custody and care of petitioner, other than commitment to the custody of the Attorney General, were presently available. Based on these findings, the court ordered petitioner committed to the custody of the Attorney General until occurrence of any one of the following conditions: (1) petitioner regained sanity or mental competency; (2) his mental condition improved to the extent that, if released, he no longer would endanger the safety of officers, property, or other

interests of the United States; or (3) suitable arrangements were made for petitioner's custody and care by the State of Ohio. (R. 17–18.) The court attached an opinion in which it summarized the evidence on which its findings and order were based (R. 19–21).

Petitioner appealed on the grounds that 18 U. S. C. 4244, 4246, 4247, and 4248 were unconstitutional and that the finding that he, if released, probably would endanger officers, property or other interests of the United States, was not based on sufficient evidence. The court of appeals sitting en banc affirmed, Judge Van Oosterhout dissenting. (R. 75–90).

SUMMARY OF ARGUMENT

Petitioner came lawfully into the custody of the Attorney General under a charge of having committed a federal offense, and is being held pursuant to federal judicial findings that he is incompetent; that, if released, he would endanger officers, property or other interests of the United States; and that no suitable arrangements are presently available for his custody and care by the state of his residence. He is being held until (1) he regains his sanity or (2) he recovers so that, if released, he will no longer be a danger to federal interests, or (3) suitable arrangements can be made for his custody and care by his state of residence. Petitioner attacks his commitment on the ground that the statute was not intended

to authorize the commitment of persons more than temporarily insane, and that if so interpreted it constitutes an unconstitutional encroachment upon the reserved powers of the states. He further attacks the trial court's finding that if released he will probably endanger federal interests.

I

Sections 4244 to 4248 of the Criminal Code evolved from a prolonged study made by a Committee of the Judicial Conference and provide comprehensively for the care and custody of insane persons charged with or convicted of offenses against the United States.

The statute provides for two types of commitments of persons accused of crime. On a finding of mental incompetence, without more, the accused may be committed to the custody of the Attorney General "* * * until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." This provision has been held to authorize the commitment only of persons found to be temporarily insane, that is, whose trial can be foreseen. *Wells* v. *Attorney General of the United States*, 201 F. 2d 556 (C. A. 10); *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9).

The statute further provides that if it is found that (1) the accused, if released, will probably endanger the safety of officers or property of the United States, and (2) that suitable arrange-

ments for his custody and care are not otherwise available, then he shall be committed until sane, or until so improved that if released he will not endanger United States interests, or until suitable arrangements for his custody and care have been made by the state of his residence, whichever event shall first occur. Petitioner's commitment is of this type.

It will be noted that the term of commitment under commitments of the latter type is independent of the pendency of the charge and by its nature is of indefinite duration. The conclusion that the statute was intended to apply to persons found to be more than temporarily insane becomes inescapable when its background and the legislative history are considered. The statute was explicitly drafted so as to provide authority for commitment of persons lawfully in the custody of the federal government, whom it was not safe to let at large, where no state would assume responsibility for their care and custody.

II

The statute is within the constitutional powers of the federal government and does not constitute an invasion of the powers reserved to the states under the Tenth Amendment.

In searching out the constitutional warrant for the statute, we look beyond the granted powers to those which are necessary and proper to the

functioning of the federal government in the exercise of its specifically delegated powers. It is significant that the question arises in an area marked by complementary efforts of state and nation to meet the exigencies of admitted public needs. As this Court has cautioned: "* * * it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral." *Hoke* v. *United States*, 227 U. S. 308, 322.

A. The power to commit persons charged with a federal offense to await trial stems from the criminal jurisdiction of the federal government. The power to punish, itself being implied, includes all rights incidental to the power and "conducive to its beneficial exercise." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 418.

But where it appears that the accused will never be tried because of his mental condition, it is appropriate to look to sources supplementing the government's criminal powers, for insanity is not a crime. We note, however, that in the present development of our knowledge it can seldom be known with any certainty whether a state of mental incompetence will last so long as to preclude trial. The record shows, for example, that it is not at all clear that petitioner will not recover so as to permit his trial at some future

date. So long as the possibility of trial is not foreclosed, the power to commit finds support in the criminal powers of the government.

Congress has provided for the commitment of an accused found to be more than temporarily insane only under narrowly defined circumstances, *i. e.*, where it is found that the incompetent, if released, will probably endanger federal interests and where suitable arrangements for his custody and care are not otherwise available.

The federal government has long provided institutional care for other insane persons in whom it has a special interest, such as active and retired military personnel, discharged military personnel whose insanity is service-connected, Foreign Service personnel and overseas employees of the Foreign Service, United States citizens adjudged insane in Canada, patients of the Public Health Service, etc. The Court of Appeals for the District of Columbia Circuit has consistently upheld commitments under these statutes and has further held that the incompetent cannot compel his transfer to the state of his residence unless he can show that such state is willing to accept him into its custody. *E. g.*, *Howard* v. *Overholser*, 130 F. 2d 429 (C. A. D. C.); *De Marcos* v. *Overholser*, 122 F. 2d 16 (C. A. D. C.), certiorari denied, 314 U. S. 609. That court has referred to the concern and duty of the government to provide for the care of such persons and the government's duty to confine them, so long as they are found to be

incompetent, for their own safety and for the protection of the public. It would appear that a person lawfully in federal custody on a federal charge is similarly in a special relationship with the federal government, which gives rise to a duty adequately to provide for his care and treatment.

The power to commit persons for whom it is responsible is buttressed here by the power of the federal government to protect its officers and property from criminal acts. This same inherent power underlies the criminal code which, *inter alia*, provides federal punishment for acts affecting the safety of federal officers, damage to federal property, obstructions to the operation of government, etc. The importance of devising a procedure for committing dangerous incompetents in order to protect federal interests was stressed at the hearing on this legislation.

The statute as applied in this case also draws support from the power of the federal government to protect the public welfare against "the spread of * * * harm to the people of other States from the State of origin." Cf. *Brooks* v. *United States*, 267 U. S. 432, 436. While Congress has not sought to frame the statute in question in terms of its power over interstate commerce, as it did the quarantine statute (42 U. S. C. 264), the operative elements which give rise to federal power under the commerce clause are present.

The ease of modern transportation lends force to the suggestion that a dangerous incompetent turned loose in any state might prove a source of harm to people of other states.

B. Numerous analogies illustrating the ambit of federal power in other fields fortify our conclusion that the federal government has the power to commit incompetents under the circumstances shown here, without regard to the probable duration of the insanity.

C. The power asserted by the federal government cannot be said in any practical sense to encroach upon any rights of the states. It arises in an area of emerging recognition by both state and federal governments of their responsibility to provide care for incompetents for whom they are responsible, despite its cost and inconvenience, and not an area of competing assertions of jurisdiction such as have arisen with respect to the taxing power of state and federal governments. The statute avoids conflict, for it is operative only where the federal government finds itself with a dangerous incompetent lawfully in its custody, for whom no state will provide custody and care. The state of residence claimed by the incompetent can not be compelled to receive and institutionalize him. See *Howard* v. *Overholser*, 130 F. 2d 429, 433 (C. A. D. C.). And federal detention must terminate at any time that it is shown that suitable facilities are available for the

care and custody of the incompetent in his home state. It would be a perversion of meaning to describe the operation of the statute as affecting an inroad on state power. The federal government has been authorized to act only in the absence of state action and in the presence of danger; Congress has thus deliberately asserted "the least possible power adequate to the end proposed." See *Anderson* v. *Dunn*, 6 Wheat. 204, 230; *Toth* v. *Quarles*, 350 U. S. 11, 23.

D. The fact that Ohio might release petitioner if he were again transferred to her custody does not detract from the right and duty of the federal government to provide custody and care under the circumstances shown. It is indisputable that the statute was intended to apply not only to cases where the residence of the incompetent could not be determined, but also to cases where the residence was known but the state concerned could not be persuaded to provide custodial care. In this case, petitioner had been transferred to Ohio, which, upon hearing, found him sane and for that reason refused custody. Petitioner, having been adjudged sane, the federal authorities were obliged to return him to Missouri to stand trial on the pending federal charge. As a preliminary to trial, it was incumbent upon the federal court to determine his competence at that time to stand trial. Cf. *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9). Finding him incompetent, the

district court then faced the question whether to return him again to Ohio. In the light of the recent action of Ohio in releasing petitioner, the court was warranted in concluding that "suitable arrangements for the custody and care of the accused" were not there available. Petitioner has made no attack on this finding, which was affirmed by the court of appeals, undoubtedly because he recognizes that at any time that suitable arrangements for his custody and care can be made with the State of Ohio, he has a right under the statute and under the terms of his commitment to be transferred forthwith into her custody.

E. Finally, petitioner contends that his commitment constitutes punishment without due process of law. But petitioner is being held, not as punishment, but for treatment because he is dangerously insane and no other jurisdiction will care for him. A commitment for insanity is not punishment. *Hill* v. *United States*, 206 F. 2d 204, 205–206 (C. A. 6), certiorari denied, 346 U. S. 859. The federal government having the power to commit persons in petitioner's circumstances, due process of law is satisfied by notice and opportunity to defend. *Simon* v. *Craft*, 182 U. S. 427. The statute provides for notice and hearing, and the record shows that the procedure followed by the district court conformed with the provisions of the statute.

The end served by the statute under attack is legitimate, and the means employed are those ac-

cepted by our jurisprudence as prerequisite to denial of liberty on the ground of insanity. The statute constitutes an exertion of federal authority consistent with the spirit and letter of the Constitution.

III

The finding of the trial court, affirmed by the court of appeals, that petitioner, if released, probably will endanger the safety of officers, property and other interests of the United States is sustained by substantial evidence. All the psychiatrists who examined petitioner (except one who did not testify on the point) agreed that petitioner, if released, might continue in the type of criminal activity charged.

ARGUMENT

Petitioner, who came lawfully into the custody of the Attorney General under a charge of having committed a federal offense, *i. e.* armed robbery of a post office and felonious assault upon a postal clerk, is being held at the federal Medical Center pursuant to federal judicial findings that he is incompetent; that if released he would endanger officers, property or other interests of the United States; and that no suitable arrangements are presently available for his custody and care by the state of his residence. He is to be held in custody until one of three conditions occur: (1) he regains his sanity, in which case

he will be tried on the federal charges; (2) his mental condition improves to the extent that, although he is still not sufficiently competent to stand trial, he may be released without danger to the officers, property, or interests of the United States; or (3) suitable arrangements can be made for his custody and care by the state of his residence. (R. 17–18.) Thus petitioner is being held to meet a specific need to protect federal interests in the special situation presented by the circumstances:—petitioner lawfully came into federal custody; he cannot be released without danger to federal interests; and no other jurisdiction will provide custody and care. He is to be held for such period of time, long or short, as the need to protect federal interests persists.

Petitioner was committed under the provisions of 18 U. S. C. 4244, 4246, 4247, and 4248. He does not challenge the fact that he came lawfully into federal custody nor the finding that he is insane. Rather, petitioner insists that the statute is not to be construed to authorize commitment when it appears that the person concerned is more than temporarily insane and that he probably will not be tried for the federal crime which led to his apprehension (Pet. Br. 10–18). Petitioner argues further that, if the statute be construed as authorizing his commitment, it is an unconstitutional encroachment upon the powers re-

served to the states (Pet. Br. 18–29). In addition to the statutory and constitutional contentions, petitioner contests the sufficiency of the evidence to support the finding that, if released, he probably will endanger the safety of officers or property of the United States (Pet. Br. 29–32).

This is the first reported case involving a commitment pursuant to the second sentence of Section 4246. That sentence, read with the provisions of Sections 4247 and 4248, which are incorporated by reference, authorizes the commitment of an insane person charged with a federal offense, although it appears that he may never be tried, when it is found that, if released, he will probably endanger the safety of federal officers, property or other interests, and that suitable arrangements for his custody and care are not otherwise available.[2] Previous decisions have concerned the question whether persons found to be more than temporarily insane may be confined under the first sentence of Section 4246 which provides for commitment "until the accused shall be mentally competent to stand trial or until the pending

[2] As of January 3, 1956, five persons in addition to Greenwood were being held at the United States Medical Center for Federal Prisoners at Springfield, Missouri, under a commitment pursuant to the provisions of the second sentence of Section 4246.

charges against him are disposed of according to law."[3] The Courts of Appeals for the Ninth and Tenth Circuits have interpreted this provision to provide only for the temporary detention of persons accused of federal crime, and, so interpreted, have upheld its constitutionality. In so doing, they did not reach the question of the power of Congress to provide for the commitment of persons charged with federal crime who are found to be more than temporarily insane. *Wells* v. *Attorney General of the United States*, 201 F. 2d

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[3] The records of the United States Medical Center for Federal Prisoners at Springfield indicate that as of January 3, 1956, 167 persons had been committed under the provisions of Section 4246. (This figure includes the six persons mentioned in n. 2, *supra*.) Of these, 43 are still held at the hospital. A study of cases released reveals the following disposition: released to state hospital (35); returned to court as competent to stand trial (71); released by court on writ (12); released following dismissal of charges (3); released on bond by court (1); released for deportation (1); released by death (1). As a result of crowded conditions at St. Elizabeths Hospital in Washington, D. C., most federal prisoners, other than those from the District of Columbia, have been committed, in recent years, to the Medical Center at Springfield. The statistics published in Note, *Federal Hospitalization of Insane Defendants under Section 4246 of the Criminal Code*, 64 Yale L. J. 1070, 1073, n. 16 (1955), include residents of the District of Columbia committed to St. Elizabeths Hospital in Washington, D. C. See p. 37, n. 18, *infra*.

556 (C. A. 10); *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9).[4]

We argue below that Congress, under the narrow conditions incorporated in the second sentence of Section 4246, has authorized the commitment of persons charged with federal crime who are found to be more than temporarily insane, and that the statute falls within the ambit of federal power under the Constitution. Finally, we deal with petitioner's insubstantial challenge to the trial court's finding that petitioner, if released, will probably endanger federal interests.

I

THE DETENTION OF AN INSANE PERSON CHARGED WITH A FEDERAL CRIME IS AUTHORIZED BY STATUE, REGARDLESS OF WHETHER SUCH PERSON IS APT TO RECOVER, WHEN HIS RELEASE WOULD PROBABLY ENDANGER FEDERAL INTERESTS AND NO SUITABLE ARRANGEMENTS FOR HIS CUSTODY AND CARE ARE OTHERWISE AVAILABLE.

Petitioner's contention (Br. 10–18) that proper interpretation would make 18 U. S. C. 4246, 4247, and 4248 inapplicable to persons charged with crime who are more than temporarily insane re-

[4] To the same effect are *Kitchens* v. *Steele*, 112 F. Supp. 383 (W. D. Mo. 1953); *Craig* v. *Steele*, 123 F. Supp. 153 (W. D. Mo. 1954); *Wright* v. *Steele*, 125 F. Supp. 1 (W. D. Mo. 1954); see further *Higgins* v. *McGrath*, 98 F. Supp. 670, 674 (W. D. Mo. 1951). One district judge interpreted this provision to permit permanent confinement, and for that reason held the statute unconstitutional. See *Dixon* v. *Steele*, 104 F. Supp. 904, 908 (W. D. Mo. 1952); *Edwards* v. *Steele*, 112 F. Supp. 382, appeal dismissed, 204 F. 2d 513 (W. D. Mo. 1952).

quires an analysis of these sections as well as of Sections 4244 and 4245.

Sections 4244–4248 were added to Title 18 (Chapter 313) of the United States Code on September 7, 1949, as an Act "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes." 63 Stat. 686. This legislation evolved from a prolonged study made by a committee of federal judges appointed by the Judicial Conference of the United States in 1942 for the purpose of studying, in cooperation with the Attorney General, the treatment accorded by the federal courts to insane persons charged with crime.

The committee, headed by Senior Circuit Judge Calvert Magruder of the First Circuit,* reported the results of its study to the Judicial Conference in 1945, and put forward a preliminary draft

*Other members of the Committee were Senior Circuit Judges Learned Hand of the Second Circuit and Curtis D. Wilbur of the Ninth Circuit, Circuit Judges Otto Kerner of the Seventh Circuit, and Charles C. Simons (now Chief Judge) of the Sixth Circuit, District Judge Merrill E. Otis of the Eighth Circuit, and Chief Justice Edward C. Eicher of the United States District Court for the District of Columbia. Judge Otis and Chief Justice Eicher were replaced upon death by Chief Justice Bolitha J. Laws of the District Court for the District of Columbia, and Judge Carroll C. Hincks, then District Judge for the District of Connecticut (now a Judge of the United States Court of Appeals for the Second Circuit).

bill.[6] This draft was then circulated among all federal judges. Following revision in the light of comments received and in consultation with the Attorney General and the Director of the Federal Bureau of Prisons, the draft was submitted to the Judicial Conference in 1946 and approved unanimously.[7] A bill incorporating its terms was introduced in the 80th Congress as S. 850,[8] reintroduced in the 81st Congress as S. 936,[9] and enacted into law. As the court below noted (R. 84), the statute was thus drafted with the utmost care and deliberation, and was "designed to solve numerous difficulties which have arisen in the manner of dealing with delinquents suffering from mental disorders." S. Rep. 209, 81st Cong., 1st Sess., p. 1.

Section 4244 provides the machinery for determination of the mental competency of a person charged with a federal offense when, at any time

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[6] Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged With Crime, Judicial Conference of the United States (1945) (hereinafter cited Judicial Conference Report). The Conference received and approved the report of the committee. See Report of the Judicial Conference, September Session, 1945, pp. 19–20.

[7] See Report of the Judicial Conference, October session, 1946, p. 18; Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 850, 80th Cong., 2d Sess., pp. 3–4 (hereinafter cited Hearing on S. 850). Judge Magruder knew of no opposition to the bill. *Id.*, p. 12.

[8] See 94 Cong. Rec. 7221, 7707.

[9] S. Rep. 209, 81st Cong., 1st Sess.; H. Rep. 1319, 81st Cong., 1st Sess.

after arrest and prior to imposition of sentence or prior to the expiration of any period of probation, there is reasonable cause to believe that he is mentally incompetent. On motion of the United States Attorney, of the defendant, or *sua sponte*, the court may appoint a psychiatrist to examine the defendant or commit him for examination to a hospital. The section provides for a hearing, upon due notice, if the psychiatric report indicates that the accused is mentally incompetent or insane. Section 4245 is designed to deal with cases where a person has already been convicted of a federal offense and it is discovered at the prison that there is probable cause to believe that the prisoner was mentally incompetent at the time of trial.

Section 4246 authorizes the commitment of persons found mentally incompetent in hearings conducted pursuant to Sections 4244 and 4245. The first sentence of Section 4246 provides that on a finding of mental incompetency, without more, the accused may be committed to the custody of the Attorney General "* * * until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." The second sentence provides, however, that if the court finds (as it did with respect to the accused in the instant case) that the additional "conditions specified" in Section 4247 exist, the commitment is to be governed by Section 4248.

Section 4247 is primarily applicable to convicted federal prisoners whose sentences are about to expire. It provides that upon the certification of the Director of the Bureau of Prisons that in his judgment and that of the Board of Examiners "the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available," the court in the district of confinement shall hold a hearing, upon notice, to determine whether the "conditions specified" exist. If the court determines that the "conditions specified" exist, it is authorized to commit the prisoner to the custody of the Attorney General.

Section 4248 provides the term for commitments made pursuant to Section 4247 and the second sentence of Section 4246. The term runs "until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur."

It will be noted, from this summary, that Section 4246 provides for two types of commitments.

On a finding of mental incompetence alone, the accused may be committed "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." This provision, as noted above, has been held to authorize the commitment only of persons found to be temporarily insane, and not to be applicable to cases where the insanity is found to be of indefinite duration. *Wells* v. *Attorney General of the United States*, 201 F. 2d 556 (C. A. 10); *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9). These courts have considered that the language of this provision, which speaks of commitment until the accused shall be competent to stand trial or until the pending charges against him are disposed of, in its nature presupposes temporary insanity.

Section 4246 goes on to provide that if "the conditions specified" in Section 4247 exist—*i. e.*, (1) that if released the accused will probably endanger the safety of officers or property of the United States, and (2) that suitable arrangements for the custody and care of the accused are not otherwise available—then the commitment shall be governed by Section 4248. The latter section provides for commitment until the sanity of the person is restored, or until his mental condition is so improved that, if released, he will not endanger the safety of the United States interests, or until suitable arrangements have been

made for his custody and care by the state of his residence, whichever event shall first occur. Such a commitment, which is entirely independent of the continued pendency of a charge, is by its nature of indefinite duration.

Petitioner's argument that the statute should not be interpreted to reach cases where the insanity is more than temporary (Br. 10–18) rests wholly on decisions construing the first sentence of Section 4246 (*supra*, pp. 21–22, 27), which presupposes temporary insanity and temporary detention. Since a commitment under this provision is dependent on the pendency of a charge and since, as Judge Magruder explained,[20] the constitutional right of a person to a speedy trial under the Sixth Amendment would ultimately require that the charges be dismissed, the statutory basis for this type of commitment could not persist indefinitely. But petitioner ignores the second sentence of Section 4246 which, within the narrow confines of the conditions specified, provides a statutory basis for commitment, independent of the pendency of a charge. As the background and legislative history demonstrate, it was precisely to meet the need for federal authority to commit federal offenders who were more than temporarily insane that this provision was included in the statute.

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[20] Hearing on S. 850, 80th Cong., 2d Sess., p. 3.

As early as 1857, Congress had provided in general terms for the commitment of any person charged with crime who was found to be insane (11 Stat. 158, 24 U. S. C. 211), but the Attorney General in 1881 ruled that this statute was applicable only to insane of the District of Columbia. 17 Op. Atty. Gen. 211. Congress forthwith, in 1882, amended another statute, providing for the transfer to the federal mental hospital of prisoners who became insane while serving their sentences (18 Stat. 251), to authorize the transfer to the mental hospital of "all persons who, having been charged with offenses against the United States, are in the actual custody of its officers." 22 Stat. 330, 24 U. S. C. 212. While some commitments were made under this provision,[11] it appears that federal authorities commonly resisted assuming custody of incompetent defendants in cases other than those where special dangers to federal interests were involved.[12]

One reason for the reluctance of federal authorities to accept custody of persons more than temporarily insane may have been doubt as to the applicability of the 1882 statute to persons whose

[11] E. g., *United States* v. *Torrez*, unreported (D. Mass.); *United States* v. *Hook*, unreported (S. D. Fla.). Both cases are discussed in Judicial Conference Report, pp. 7-9. See Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 Yale L. J. 684, 694-695 (1944).

[12] See Judicial Conference Report, p. 9; Holtzoff, *Looking at the Law*, 7 Fed. Probation No. 2 (1943) p. 44.

trial could not be foreseen. As we have noted, the statute also authorized transfer to a mental hospital of prisoners who became insane while serving their sentences. In 1916, however, the Attorney General ruled that the statute did not authorize detention of prisoners after their terms had expired, on the ground that (30 Op. Atty. Gen. 569, 571):

> Longer detention could only be justified here because of alleged insanity; but detention for insanity must be pursuant to law, which law must provide for notice and proper hearing on that issue. *Simon* v. *Craft*, 182 U. S. 427. The above statute does not pretend to provide for any such hearing. It only authorizes a "transfer": *i. e.*, a change of the *place* of lawful custody. [Emphasis in original.]

This view was reiterated in 1927, 35 Op. Atty. Gen. 366, 369.[18] But see *Kuczynski* v. *United States*, 149 F. 2d 478, 480 (C. A. 7). If the statute (24 U. S. C. 212) was defective in relation to former prisoners after the expiration of their sentences, in that it did not provide a commitment procedure, it was no less defective as applied to persons accused of crime whose trial could not be foreseen.

Upon a review of the problem, the Committee of the Judicial Conference reported (Report, pp. 7–8):

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[18] In 1930 Congress directed the superintendent of the federal mental hospital to deliver insane prisoners to the custody of state authorities at the expiration of their federal sentence. 46 Stat. 272, as amended, 18 U. S. C. 4243.

> If the accused's mental disability appears not to be a transitory condition, but in all likelihood he will, because of his insanity, never be brought to trial, it would seem that as a general rule the federal government should not assume responsibility for his hospitalization merely because he has been accused (but not convicted) of a federal crime. Normally such a person should be turned over to the state of his domicile to be confined in a state mental hospital if hospitalization is called for.
>
> But there may be cases where the accused's domicile cannot be satisfactorily established and where no state will assume responsibility for his care. *The federal government may then be faced with the practical situation that it has lawful custody of a person whom it is not safe to let at large. * * * Obviously in such case there should be authority in the court to cause the confinement of the accused in a mental hospital.* [Emphasis added.]

The draft bill submitted by the Judicial Conference committee spelled out this authority. In describing the need for the bill, Judge Magruder explained that in many cases the government "has, so to speak, the bear by the tail * * * because there is no procedure by which a person who is charged with crime but who is incapable of being tried because of mental condition * * * could be held *indefinitely* even though he may be one who would be a menace to be left at large."

Hearing on S. 850, 80th Cong., 2d Sess., p. 5. [Emphasis added.]

The conclusion is inescapable that the second sentence of Section 4246 was intended by Congress to authorize and does authorize the commitment of persons charged with federal crime who, like petitioner, are more than temporarily insane and whose trial cannot be foreseen.

II

CONGRESS MAY CONSTITUTIONALLY PROVIDE FOR THE CONFINEMENT OF INSANE PERSONS DANGEROUS TO FEDERAL INTERESTS, WITHOUT REGARD TO THE PROBABLE DURATION OF THEIR INSANITY, WHERE NO SUITABLE ARRANGEMENTS FOR THEIR CUSTODY AND CARE ARE OTHERWISE AVAILABLE

The constitutional problem raised by petitioner (Br. 18–29) concerns the line to be drawn between the respective spheres of jurisdiction of the separate states and the United States in our federal system of government. It is significant, we suggest at the outset, that the question arises in an area marked not by competition between the state and federal jurisdictions, but by comity and cooperation in the interest of the total public welfare, which is equally the concern of both. As we show more fully below (pp. 46–47), in comparable situations the powers of the federal government have been given a liberal and a practical construction so that the federal system may work and the exigencies of admitted public needs may

be met through the complementary efforts of state and nation. Petitioner's attack is not unlike that originally made on the Mann Act, which was challenged as an unconstitutional invasion of the powers of the states to control the morality of their citizens and as an infringement of the liberty of travel. *Hoke v. United States*, 227 U. S. 308. In considering these contentions, which it rejected, this Court cautioned (*id.* at 322):

> Our dual form of government has its perplexities. State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

Coming to the issue, we find ample constitutional warrant for commitment by the federal government of dangerous incompetents for whom no state will provide custody and care.

A. THE SOURCES OF FEDERAL POWER TO COMMIT INCOMPETENTS

1. *The powers of the federal government which are incident to the exercise of its criminal jurisdiction.*

The power to commit incompetents will not be found among the powers granted to the federal government. It stems rather from the authority contained in Article I, Section 8, clause 18, of the Constitution "to make all Laws which shall be necessary and proper for carrying into execution

the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Much of the practical power of the Federal Government is founded on this "necessary and proper" clause. The approach of Chief Justice Marshall, in explaining the constitutional warrant for the criminal code, is instructive (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 418):

> The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

The warrant for federal commitment of persons to await trial is immediately apparent. The power to punish is a broad power which must include all rights "incidental to the power, and conducive to its beneficial exercise." These include all the rights and duties, substantive and procedural, appropriate to the exercise of criminal jurisdiction. *See United States* v. *Fox*, 95 U. S. 670. Thus it is not questioned that the federal government, even in the absence of statute, is authorized to determine the sanity of a

person charged with a federal offense, and, if found incompetent, to detain him pending recovery and trial. *Youtsey* v. *United States*, 97 Fed. 937, 940 (C. A. 6); *Forthoffer* v. *Swope*, 163 F. 2d 707 (C. A. 9).[11] The power to hold for trial is recognized as incidental to the power to try and punish and persists so long as the possibility of trial is not foreclosed.

We agree with petitioner (Br. 22–29) that the power to commit, where it appears that the accused will never be tried, cannot rest solely on the government's criminal powers. As Judge Magruder explained in presenting the bill to Congress, "insanity is not a crime. You are not being held on the theory that you have been convicted of a crime." Hearing on S. 850, 80th Cong., 2d Sess., p. 9. We note, however, that in the present development of our knowledge it can seldom be known with any certainty whether a state of mental incompetence will last so long as to preclude trial. As the directors of the two federal hospitals for the insane have both recently explained, a determination as to whether insanity is temporary or permanent is "highly impractical" or "at best" only speculation. See Note, *Federal Hospitalization of Insane Defendants*

[11] See Judicial Conference Report, pp. 6–7; Hearing on S. 850, 80th Cong., 2d Sess., pp. 4–5; Pollak, *Insanity as a Bar to Prosecution in Federal Courts*, 7 Fed. Bar J. 55 (1945). This was the procedure at common law. *Case of John Frith*, 22 How. St. Tr. 307; 1 Hale, Pleas of the Crown 35; 4 Blackstone, *Commentaries* 24; see *Youtsey* v. *United States*, 97 Fed. 937, 941 (C. A. 6).

under Section 4246 of the Criminal Code, 64 Yale L. J. 1070, 1075, n. 33 (1955). It is not at all clear, for example, that petitioner will not recover so as to permit his trial (see R. 53–54). The most that can be said is that his "likelihood of recovery is poor" (R. 54). But in any event, as we show below, the fact that it appears that a particular incompetent may never be tried does not frustrate the power of the federal government, otherwise recognized, to commit him.

In dealing with this issue, we need not consider, as petitioner urges (Br. 18–21), whether Congress has power to commit any incompetent accused of federal crime whose trial cannot be foreseen. We agree with the Courts of Appeals for the Ninth and Tenth Circuits[15] that Congress has not, in the statute in question, sought to exercise so broad a power. The provisions authorizing the indefinite commitment of persons accused of crime apply only under narrowly defined circumstances, *i. e.*, where it is found that the incompetent if released will endanger federal interests and where suitable arrangements for his custody and care are not otherwise available.

The power to act in these circumstances finds independent support in the authority of the federal government to deal with persons lawfully under its control and for whom, having assumed

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[15] *Wells* v. *Attorney General of the United States*, 201 F. 2d 556 (C. A. 10); *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9).

jurisdiction, it is responsible. It is also supported by the power of the federal government to protect its officers, property and other interests from harm from any source.[16]

2. *The duty of the federal government to provide care and custody for incompetents lawfully under its control*

Looking first to the authority of the federal government to provide care and custody for persons lawfully under its control, we find numerous statutes providing for institutional care of insane persons, in whom the federal government has a special interest. As early as 1855, Congress established St. Elizabeths Hospital[17] for the care, among others, of the "insane of the army and navy," and of the District of Columbia.[18] By subsequent legislation, Congress has provided for the custody and care of military personnel who have been discharged from military service but whose insanity is service-connected, for civilians employed by the Quartermaster Corps of the

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[16] See Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 Yale L. J. 684, 694–695 (1944).

[17] The Government Hospital for the Insane was established pursuant to the Act of March 3, 1855, c. 199, 10 Stat. 682. Its name was subsequently changed to St. Elizabeths Hospital. 39 Stat. 309. The establishment of the United States Medical Center for Federal Prisoners at Springfield, Missouri, was authorized in 1930, 46 Stat. 270, and the Medical Center was opened in 1933.

[18] The federal government, of course, has exclusive jurisdiction over the District of Columbia and other federal territories and exercises the same powers over the residents thereof as are otherwise reserved to the states. U. S. Constitution, Art. I, Sec. 8, cl. 17; Art. IV, Sec. 3, cl. 2.

Army who become insane while in such employment,[18] for Foreign Service personnel and overseas employees of the Foreign Service,[19] for inmates of the Soldiers' Home[20] and of the National Home for Disabled Volunteer Soldiers,[21] United States citizens adjudged insane in the Canal Zone,[22] in Canada,[23] and in the Virgin Islands,[24] and patients of the Public Health Service.[25]

Some of the foregoing statutes authorize federal custody until the subject is cured or removed by the same authority ordering his reception. The provisions authorizing the custody and care of military personnel are in this category. Others, such as those applicable to persons who are adjudged insane in foreign countries, provide for transfer to the place of residence of the person concerned, upon its ascertainment. Under statutes of this type, the Court of Appeals for the District of Columbia Circuit has consistently held that a person found insane and confined at St. Elizabeths Hospital could not compel his transfer to the state of residence unless he could show that such state was willing to receive him into its custody." *Howard* v. *Overholser*, 130 F. 2d 429

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[18] 24 U. S. C. 191.
[19] 24 U. S. C. 191a.
[20] 24 U. S. C. 194.
[21] 24 U. S. C. 195.
[22] 24 U. S. C. 196.
[23] 24 U. S. C. 196a.
[24] 24 U. S. C. 196b.
[25] 42 U. S. C. 222.

(C. A. D. C.); *Williams* v. *Overholser*, 137 F. 2d 545 (C. A. D. C.); *De Marcos* v. *Overholser*, 122 F. 2d 16 (C. A. D. C.), certiorari denied, 314 U. S. 609. The *De Marcos* case, for example, involved an insane citizen received from Canada. He brought habeas corpus to direct his transfer to Tennessee, where he claimed residence. But since it appeared that Tennessee was unwilling to receive him, the result of granting the petition "would be to set at large a person found in the District of Columbia to be of unsound mind and who had previously been convicted of a serious crime" (*id.* at 17). The court denied the petition, stating (*id.* at 17):

> * * * We can think of no justification for such action. This country, having accepted petitioner from the Canadian Government as an insane citizen of the United States and the court having upon a hearing found him to be incapable of taking care of himself, *had the duty to confine him* in one of its own institutions *for his own safety and for the protection of the public* until he could be transferred to one in the state of his residence; and since it does not appear that there is such a place anywhere he must be kept in St. Elizabeths Hospital until cured of his mental disease. * * * [Emphasis added.]

In other cases as well, that court has emphasized that the care and custody of an insane per-

son for whom the federal government has a special responsibility is a "concern and duty of the government," which is not dependent upon residence in the District of Columbia. See *White* v. *Treibly*, 19 F. 2d 712, 713 (C. A. D. C.) (retired naval officer); *Barry* v. *Hall*, 98 F. 2d 222 (C. A. D. C.) (merchant seaman). The provision of care, of course, in the case of incompetents may necessarily include custody. Indeed, so far as we know, the power of the federal government to provide for the custody and care of persons over whom it has assumed responsibility because of some special relationship to the federal government has never been questioned on constitutional grounds.

A person lawfully in federal custody on a federal charge similarly occupies a special relationship to the federal government which gives rise to a duty to provide or arrange for his care and treatment. "Common principles of humanity would seem to dictate that when the federal government has taken one into lawful custody, under the exercise of valid power, charged with the responsibility of exhausting its jurisdiction over the subject matter as well as the person thus brought before it who thereafter is found to be insane, it then becomes its duty to adequately care and provide for such a one * * *." Judge Huxman, dissenting in *Wells* v. *Attorney General of the United States*, 201 F. 2d 556, 561 (C. A. 10).

3. The power of the federal government to protect federal interests from harm

The power of the federal government to commit persons for whom it is responsible is buttressed here by the federal power to protect officers and property of the United States from criminal acts. "Congress, undoubtedly, possesses [the power of self protection], as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs* v. *United States*, 290 U. S. 534, 545. This is a broad power, and has been relied on by the courts in sustaining commitment of persons with whom the government has a special relationship giving rise to a duty of care. Thus, as in the *DeMarcos* case (quoted *supra*, p. 39), reference is commonly made to the protection of the public as well as of the individual committed. This constitutional warrant for commitment is made a condition of commitment under the second sentence of Section 4246. Commitment is authorized only after a finding that the accused, if released, "will probably endanger the safety of the officers, the property, or other interests of the United States." 18 U. S. C. 4247.

There can be no doubt that Congress has the power under the Constitution to protect federal officers, property, and other interests. This is the constitutional warrant for the entire criminal

code, which provides federal punishment for acts which, *inter alia*, threaten the safety of federal officers (*e. g.*, 18 U. S. C. 111, 1114, 2114), damage federal property (*e. g.*, 18 U. S. C. 1361, *et seq.*), obstruct the operation of government (*e. g.*, 18 U. S. C. 201, *et seq.*), etc. The federal government surely has the same sort of inherent power to protect its officers and its processes from criminal acts of insane persons, subject, of course, to the requirement that the means adopted be reasonable and consistent with the traditions of our law. In short, while danger to the public peace is by no means the entire justification for involuntary detention of incompetents by public authority, it is a contributing reason for detention of incompetents with propensities toward criminality. Indeed the importance of devising a procedure for committing dangerous incompetents in order to protect federal interests, was stressed by Judge Magruder at the hearing on this legislation.[27]

4. The power of the federal government to prevent the spread of harm from one state to another

The statute as applied in this case also draws support from the power of the federal government to protect the public welfare against "the spread of * * * harm to the people of other States from the State of origin". Cf. *Brooks' v. United States*, 267 U. S. 432, 436. This power has usually been found in terms of the power to promote the public welfare by denying the use of interstate

[27] Hearing on S. 850, 80th Cong., 2d Sess., pp. 5, 7–8.

commerce for purposes deemed inimical thereto. *E. g., Reid* v. *Colorado*, 187 U. S. 137; *Hoke* v. *United States*, 227 U. S. 308; cases cited pp. 46–47 *infra*.

An application of the commerce power to accomplish a purpose analogous to that here involved is the statute authorizing the detention of persons infected with a communicable disease who move, may move, or may be a source of infection to persons who may move from one state to another. 42 U. S. C. 264; see H. Rep. 1364, 78th Cong., 2d Sess., pp. 24–25. Surely the quarantine statute does not constitute an unlawful invasion of the powers of the states over the health and welfare of their citizens. Cf: 20 Op. Atty. Gen. 468, 469; 22 Op. Atty. Gen. 106; 27 Op. Atty. Gen. 85, 89. It is true that that statute is drawn with the commerce power in mind; but it seems clear that its validity as an application of that power draws additional warrant from the authority of the government to use its full power to accomplish ends consistent with the promotion of the public welfare. And, in so far as it is based on the commerce power, it may be noted that the operative elements are present in the instant situation. The ease of modern transportation lends force to the suggestion that a dangerous incompetent, turned loose in any state, may prove the source of harm to people of other states.[28]

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[28] *E. g.*, the record in the instant case shows that petitioner, a resident of Ohio, robbed a post office in Missouri, to get money to go to Louisiana (R. 59, 61, 62).

B. ANALOGIES ILLUSTRATING THE AMBIT OF FEDERAL POWER IN OTHER FIELDS SUPPORT THE CONCLUSION THAT THE GOVERNMENT HAS THE POWER TO COMMIT INCOMPETENTS UNDER THE CIRCUMSTANCES SHOWN HERE, WITHOUT REGARD TO THE PROBABLE DURATION OF THEIR INSANITY

In the interests of clarity, we have largely confined the foregoing argument to situations involving determinations of competence and the care of incompetents by the federal government. There are, however, numerous analogies which fortify the conclusion we urge—situations in which the exercise of authority incidental or appurtenant to the constitutional powers of the United States results not merely in supplementing state law (as is essentially the case here) but in displacing or superseding it. A relevant example is provided by the cases upholding the validity of the federal statute which provides for the vesting in the United States of the property of any veteran who dies intestate in a veterans' hospital or facility, leaving no heirs or next of kin. 38 U. S. C. 17–17g; *United States* v. *Gallagher*, 97 F. Supp. 1014 (S. D. Calif.); *In re McGhee's Estate*, 268 N. Y. S. 79 (Surr. Ct.), affirmed without opinions, 264 N. Y. S. 903, 262 N. Y. 686. In the absence of this statute, the property, of course, would be distributed in accordance with state law.[29]

[29] Cf. 38 U. S. C. 454 (unpaid government allowances accrued at time of death of patient in veterans' hospital who dies intestate, which under the laws of the place of his residence would escheat, shall escheat to the United States).

The various provisions of the Soldiers and Sailors Civil Relief Act of 1940, 50 U. S. C. App. 501 *et seq.*, which suspend the normal operation of state laws, have been upheld as within "a 'necessary and proper' supplementary power" to the constitutional power of the national government to declare war and to raise and support armies. *Dameron* v. *Brodhead*, 345 U. S. 322, 325. Cf. *LeMaistre* v. *Leffers*, 333 U. S. 1.

The chartering of national banks finds its constitutional warrant as being reasonably appurtenant to the powers of the federal government to lay and collect taxes, to borrow money, to declare and conduct war, etc. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 407. Recognizing that the chartering of national banks itself was authorized, this Court recently held that the "incidental powers" stemming from this implied power should not be construed so narrowly as to preclude the use by national banks in their commercial business in New York of the words "saving" or "savings", despite the fact that New York gave these words a special statutory meaning. *Franklin National Bank* v. *New York*, 347 U. S. 373. The fact that the words aptly described, in a national sense, the activity carried on by the national bank was deemed sufficient to displace the operation of state law which would have precluded the use of

these words by banks other than state-chartered mutual savings institutions.[30]

There are also numerous examples of federal laws addressed to the health, safety, and morals of the whole people which, although they may be frankly designed to control or suppress acts normally within the jurisdiction of the several states, have been upheld under the commerce or taxing power. These laws, like the commitment statute here under attack, should not be regarded as in conflict with state jurisdiction, for in the normal case they assist and supplement the enforcement of state policy. Thus, the federal power to prohibit the use of interstate commerce for noxious articles and for immoral purposes has frequently been upheld. *E. g., Brooks* v. *United States,* 267 U. S. 432 (stolen vehicles); *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (adulterated food, Pure Food and Drug Act); *Hoke* v. *United States,* 227 U. S. 308 (prostitutes, Mann Act); *Reid* v. *Colorado,* 187 U. S. 137 (diseased cattle); *Lottery Case,* 188 U. S. 321 (lottery tickets). The policy of the state of destination has been held sufficient to warrant the denial of facilities of interstate commerce for convict-made goods. *Kentucky Whip and Collar Co.* v. *Illinois Central R. R.,* 299 U. S. 334. The power of the

[30] Similarly, the rights and duties of the United States on commercial paper issued by the United States are governed by federal and not by local law. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363.

federal government under the commerce clause permits the establishment of minimum hours and wages for employees manufacturing goods which "may or will be" sold after production, "in interstate commerce in part or in whole." *United States* v. *Darby*, 312 U. S. 100, 112 (Fair Labor Standards Act). And enforcement of a federal stamp tax on narcotics, which assists in the suppression of illicit traffic in drugs, has been upheld as within the taxing power against the charge that it constitutes an unconstitutional invasion of the police powers of the states. *Alston* v. *United States*, 274 U. S. 289. See also *United States* v. *Kahriger*, 345 U. S. 22 (wagering tax). Cf. *United States* v. *Five Gambling Devices*, 346 U. S. 441 (registration of gambling devices).

C. THE POWER ASSERTED CANNOT BE SAID IN ANY PRACTICAL SENSE TO ENCROACH UPON ANY POWER OF THE STATES

We would also emphasize that the constitutional question posed by petitioner arises here in an area which has been marked by cooperation between federal and state governments to the end that no person who needs care and custody shall fail to receive it. The record has been one of an emerging recognition of the responsibility of government to provide such care, despite its cost and inconvenience, and not one of competing assertions of jurisdiction such as have arisen with respect to the taxing power of state and federal governments. Cf. *Williams* v. *United States*, 133 F. Supp. 319, 321–325 (E. D. Va.), affirmed, C. A.

4, decided December 16, 1953. Many states have cooperated in the receipt from federal authorities of insane persons who are residents of the state concerned.[31] Conversely, the federal government has received from the states insane persons for whom it recognizes a special responsibilty, including thousands of persons eligible for federal care committed by the states directly to federal institutions. See Uniform Laws Annotated, Vol. 9A, pp. 361–362 (1951); Uniform Veterans' Guardianship Act, Sec. 18, *id.*, p. 364. In further recognition of the importance of mental health to the public welfare, the federal government in 1946 established the National Institute of Mental Health, which is authorized to conduct research relating to the causes, treatment, and prevention of mental diseases, in cooperation with other public authorities, including those of the states. 42 U. S. C. 232, 241, 242a.

The statute with which we are immediately concerned very carefully avoids competition between jurisdictions, for it provides that federal custody will cease whenever "suitable arrangements have been made for the custody and care of the [accused] by the State of his residence." 18 U. S. C. 4248. Under the scheme of the Act, as we have stated, transfer to the state of the incompetent's residence is always preferred, and the question of transfer, if it is not raised by public authorities,

[31] See Hearing on S. 850, 80th Cong., 2d Sess., p. 5.

can be raised by the incompetent. *E. g.*, *Williams* v. *Overholser*, 137 F. 2d 545 (C. A. D. C.). See 18 U. S. C. 4248. The practical problem arises when the federal government finds itself with a dangerous incompetent, lawfully in its custody, for whom no state will provide custody and care. The state of residence claimed by the incompetent could not be compelled to receive and institutionalize him. See *Howard* v. *Overholser*, 130 F. 2d 429, 433 (C. A. D. C.). It is only when no alternative facilities are available that the provisions for continued federal custody become operative. Surely, it would be a perversion of meaning to describe the operation of this statute as affecting an inroad on state power. To the contrary, the Federal Government has been authorized to act only in the absence of state action and in the presence of danger, and has thus deliberately [32] asserted "the least possible power adequate to

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[32] It is evident that the statute was deliberately drafted so as to assert the least possible power adequate to the end proposed. Section 4246, as submitted to the Judicial Conference in the preliminary draft of the proposed legislation, provided simply for the commitment of persons charged with crime who had been found to be incompetent. Judicial Conference Report, Draft Bill, p. 2. The qualifying clause to the first sentence and the second sentence of Section 4246 were added in the subsequent revision of the measure.

Indeed, it appears that the scope of the statute was explicitly narrowed with the constitutional question in mind. Letter from Judge Magruder to the Yale Law Journal, April 13, 1954, cited in Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 Yale L. J. 1070, 1078, n. 55.

fine end proposed." See *Anderson* v. *Dunn*, 6 Wheat. 204, 230–231; *Toth* v. *Quarles*, 350 U. S. 11, 23.

D. THE FACT THAT OHIO MIGHT RELEASE PETITIONER DOES NOT DETRACT FROM THE RIGHT AND DUTY OF THE FEDERAL GOVERNMENT TO PROVIDE CUSTODY AND CARE UNDER THE CIRCUMSTANCES SHOWN

As a part of his attack on the constitutionality of the statute, petitioner stresses (Br. 27–28) that the statute provides for federal commitment not only of dangerous incompetents whose residence cannot be established, but also of persons for whom the state of residence will not provide custodial care. It is indisputable that the statute was intended to cover such cases. Concern as to the dangers of turning loose upon society dangerous incompetents for whom no state could be persuaded to provide custodial care was one of the factors stressed in urging the importance of this legislation.[32] Federal experience had shown that too many insane persons, turned over to state authorities at the conclusion of their sentences, "had been deprived of hospital and medical care" and let at large contrary to "the best interests of the patients and the welfare of society."[34] The problem with respect to insane persons under indictment for crime was of the same nature.[35]

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[32] Hearing on S. 850, 80th Cong., 2d Sess., pp. 5, 7–8; Judicial Conference Report, p. 11.

[34] Letter of Director of Federal Prisons, annexed to Judicial Conference Report, p. 3.

[35] Hearing on S. 850, 80th Cong., 2d Sess., p. 5.

We review below (pp. 56–58) the evidence supporting the finding of the trial court that petitioner, if released, would probably endanger the interests of the United States. The fact that the Ohio authorities had previously found petitioner sane "in a legal sense" (R. 72), was obviously not binding on the federal court. *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9); *Dyke* v. *Dyke*, 24 U. S. Law Week 2256 (C. A. 6). Cf. *Lutwak* v. *United States*, 344 U. S. 604 (bona fides of marriage); *Watson* v. *Commissioner*, 345 U. S. 544, 551 (nature of property interests). Petitioner, having been adjudged sane by state authorities in Ohio, the federal authorities in that state were obliged to return him to the District of Missouri to stand trial on the pending charge. As a preliminary to trial, it was incumbent upon the federal court in Missouri to determine petitioner's competence, at that time, to stand trial. Cf. *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9). Finding him incompetent, the court then faced the question whether to return him again to Ohio. In the light of the recent action of Ohio releasing petitioner, the court was warranted in concluding that "suitable arrangements for the custody and care of accused" were not then and there available (R. 18). Petitioner has made no attack on this finding, which was affirmed by the court of appeals (R. 88). Undoubtedly, petitioner recognizes that at any time that suitable arrange-

ments can be made for his custody and care by the State of Ohio, he has a right under the statute and under the terms of his commitment (R. 18) to be transferred forthwith into her custody.

Does the fact that Ohio might release petitioner if he were again returned there detract from the right and duty of the federal government to provide custody and care for him pursuant to the federal determination that he is incompetent and dangerous? We submit that it does not. Nothing in the Constitution requires the federal government, so long as it continues to have its own legitimate interest in petitioner's competency, to accept the state's determination as conclusive. The same sources of federal power support the commitment of petitioner as would support the commitment of a person whose residence could not be ascertained. The fact that petitioner was lawfully in the custody of the federal government to answer a federal charge at the time he was committed gives rise to that special relationship from which springs a duty of care by the federal government, and the fact that he was found dangerous to federal interests gives rise to a power to take lawful preventative measures. Considered together, these considerations provide ample constitutional warrant for petitioner's commitment.[36]

[36] If petitioner were transferred again to Ohio and again released by Ohio, the federal authorities there would be under a duty to re-transfer him to Missouri, and the district court in Missouri would still be under a duty to determine, for itself, whether he was competent to stand trial.

E. THE PROVISIONS FOR COMMITMENT AFFORD DUE PROCESS OF LAW

Petitioner further contends (Br. 23, 25) that his commitment is unconstitutional in that it constitutes punishment without due process of law. But petitioner is being held, not as punishment, but for treatment. He is in custody because he is dangerously insane and no other jurisdiction will care for him. A commitment for insanity is not punishment. *Hill* v. *United States*, 206 F. 2d 204, 205–206 (C. A. 6), certiorari denied, 346 U. S. 859.

Since insanity is not a crime, neither the constitutional guaranty of trial by jury nor any particular mode of judicial proceeding is required as a prerequisite to holding an incompetent for treatment. And since the federal government has jurisdiction to commit persons like petitioner in the circumstances found in his case, due process of law is satisfied by notice and opportunity to be heard. *Simon* v. *Craft*, 182 U. S. 427; *Barry* v. *Hall*, 98 F. 2d 222 (C. A. D. C.).

The provisions of the statute not only meet the essentials of due process but provide numerous additional safeguards. Section 4244 provides that where there is reasonable cause to believe an accused person may be insane, the court shall require examination and report by one or more qualified psychiatrists. If the psychiatric examination indicates that the subject

is incompetent or insane, the court is to hold a full hearing, upon due notice. At such hearing evidence may be submitted.[37] There is also provision for psychiatric examinations and a full evidentiary hearing in court for purposes of determining the existence of the conditions set forth in Section 4247, *i. e.*, dangerousness and lack of other available facilities for custody and care. Section 4248 provides for certification of the termination of a commitment made pursuant to Section 4247 and guarantees to one committed thereunder the right of establishing eligibility for release by habeas corpus. See *Overholser* v. *Boddie*, 184 F. 2d 240 (C. A. D. C.).

As the court below held (R. 79), there can be no question but that the procedure followed by the district court conformed to the provisions of the statute. Petitioner was present in person at the hearing which terminated in his commitment and was represented by astute court-appointed counsel (R. 23). Prior to the hearing he had been examined repeatedly by federal doctors (R. 59–71) and had secured the services of court-appointed psychiatrists (R. 13–15). After full hearing, the court found that the conditions specified by the statute pertain—that petitioner is incompetent, that, if released, he

[37] The accused is granted immunity against admission in evidence, in any subsequent criminal proceeding, of statements made by him or the finding of the judge.

would be dangerous to federal officers, property or other interests, and that no suitable arrangements for his care by the state can be made. Under these circumstances petitioner is in a class for which Congress has, in the proper exercise of its constitutional power, made special provision. Petitioner's continued confinement is therefore proper until he can show that one of the bases for termination of custody has arisen.

F. SUMMARY

The delineation of the ambit of federal power in relation to that of the states reflects a living awareness of the requirements of the public welfare. The precedents do not require that doctrines of federalism founded on the Constitution are to be given application divorced from reality so as to deny to the federal government the power to act to protect federal interests and the people of the several states, when the need for action is manifest and the particular state which might otherwise have jurisdiction cannot or will not act. The precedents demonstrate that this Court through the years has given substance to the classic formulation of Chief Justice Marshall, who in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421, searched out the limits of federal power in terms of end and means:

> Let the end be legitimate, let it be within the scope of the constitution, and all means

> which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

No one can reasonably suggest that the end served by the statute under attack is other than a legitimate one. So, too, the means employed are those accepted by our jurisprudence as prerequisite to denial of liberty to a citizen on grounds of insanity. Finally, Congress, mindful of the peripheral nature of its exertion of power, has taken pains to assert the least possible power adequate to the end proposed.

We conclude that the statute constitutes an exertion of federal authority consistent with the letter and spirit of the Constitution and that it is constitutional.

III

THE FINDING THAT PETITIONER, IF RELEASED, WILL PROBABLY ENDANGER THE SAFETY OF OFFICERS, PROPERTY, OR OTHER INTERESTS OF THE UNITED STATES IS SUPPORTED BY THE EVIDENCE

Petitioner does not challenge the finding of the court below that he is insane. On the contrary, his argument is based on the proposition that he is incompetent and is unlikely to recover. (See Pet. Br., pp. 23, 32.) Petitioner, however, challenges the finding that, if released, he probably will endanger the safety of officers, property, or other interests of the United States. (Pet. Br., pp. 29–31.)

Little need be said with respect to this contention. Under the statute, which speaks in the disjunctive, it is sufficient if petitioner's release would endanger the safety of officers, or property, or other interests of the United States. The report of the Medical Center, based upon extended observation of petitioner at the Center, and signed by Dr. Smith, Chief of the Psychiatric Service, and two staff psychiatrists attests to his delusional thinking and impaired judgment and concludes that "if released, he might persist in engaging in criminal activities similar to those with which he is presently charged" (R. 71). At the hearing, Dr. Smith testified that there was a distinct possibility that if released petitioner might continue to engage in criminal activity: "* * * * my best judgment would say that he might very well go and do the same thing over again, and to that extent obviously he would be a danger. Anyone that tries to break into a post office is certainly going to be a danger" (R. 53). Dr. Robinson, who was appointed by the court to examine petitioner as required by Section 4244 (R. 31) and thought petitioner sane, although "not very intelligent"[*] (R. 32–33), testified that

[*] Dr. Major, who also examined petitioner, pursuant to order of the court (R. 24), similarly testified that petitioner, in his opinion, was not insane at the time he examined him (R. 25). Cross-examination by petitioner's counsel cast some doubt on the scope of the examination made by these doctors (R. 25–29, 33–37).

if released, petitioner "will probably do some more stealing. * * * He might rob some more post offices. * * * That seemed to be his specialty * * *" (R. 38). This testimony as to the likelihood of continued criminal activity, which was uncontradicted, plainly supports the finding of the trial court that petitioner, if released, "probably will endanger the safety of officers, the property, or other interests of the United States" (R. 18). That finding was explicitly affirmed by the court below as sustained by substantial evidence (R. 76). The question being a factual one, the concurrent findings of the two lower courts should not be disturbed. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Delaney* v. *United States*, 263 U. S. 586, 589–590; *United States* v. *Johnson*, 319 U. S. 503, 518.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
CHARLES F. BARBER,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JANUARY 1956.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 18, provides:

> The Congress shall have power * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. . . .

United States Constitution, Tenth Amendment, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The pertinent provisions of the United States Code are as follows:

18 U. S. C. 4244:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to

assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court.

If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

18 U. S. C. 4245:

> Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial.

18 U. S. C. 4246:

> Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of ac-

fording to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided.

18 U. S. C. 4247:

Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined by a qualified psychiatrist designated by the court and one selected by the prisoner, and shall, after notice, hold a hearing to determine whether the conditions specified above exist. At such hearing the designated psychiatrist or psychiatrists shall submit his or their reports, and the report of the board of examiners and other institutional records relating to the prisoner's mental condition shall be admissible in evidence. All of the psychiatrists and members of the board who have examined the prisoner may be called as witnesses, and be available for further questioning by the court and cross-examina-

tion by the prisoner or on behalf of the Government. At such hearing the court may in its discretion call any other witnesses for the prisoner. If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative.

18 U. S. C. 4248:

Whenever a person shall be committed pursuant to section 4247 of this title, his commitment shall run until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur. Whereupon the Attorney General or his authorized representative shall file with the court which made said commitment a certificate stating the termination of the commitment and the ground therefor: *Provided, however,* That nothing herein contained shall preclude a prisoner committed under the authority of section 4247 hereof from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus. The Attorney General or his authorized representative shall have authority at any time to transfer a prisoner committed to his custody under the authority of section 4246 or section 4247 hereof to the proper authorities of the State of his residence.

U. S. GOVERNMENT PRINTING OFFICE: 1986